Supreme Court of the United States.

THE CALHOUN GOLD MINING COMPANY, PLAINTIFF IN ERROR,

vs.

THE AJAX GOLD MINING COMPANY.

REPLY BRIEF OF PLAINTIFF IN ERROR.

The brief of defendant in error was filed on the day before the oral arguments, and by leave of the court first had and obtained we are now permitted to file this reply brief.

THE FIRST ASSIGNMENT OF ERROR.

The subject of this assignment involves a construction of section 2336, Revised Statutes; it was numbered 14 in the original act of 1872.

We have made a very careful examination of the Congressional Records and find "an act to promote the development of the mining resources of the United States;" approved May 10, 1872. (See appendix to Congressional Globe, second session, Forty-second Congress.) The bill in its original form was introduced in the House by Mr. Sargent,

of California (H. R. 1016), Congressional Globe, second session, Forty-second Congress, 395. This bill was immediately referred to the Committee on Mines and Mining, and on the 8th day after its introduction Mr. Sargent, chairman of the committee, "reported back the bill, with recommendation that it do pass," and on that day it was passed (Congressional Globe, *supra*, 532). Mr. Sargent was requested to explain the bill, since the other members were not familiar with practical mining and had had no opportunity to examine the new bill. Mr. Sargent said: "I will endeavor to explain the bill if gentlemen will give me an opportunity. It does not make any important changes in the mining laws as they have heretofore existed. It does not change in the slightest degree the policy of the Government in the disposition of the mining lands. It does not increase or decrease the amount of lands or extent of leads that a miner may acquire under the mining laws." He then points out what he claims to be the only changes, to wit, that it facilitates miners in acquiring title with less trouble and with less expense; that it is merely a change of process and not of substance, except as to tunnel rights, and on this question he says: "There is another feature of the bill supplemental to the former legislation of Congress, and that is where a man or company starts and runs a prospecting tunnel, which is a work of great labor and of large expense, and they are nearing the object of their search, believing from geological indications that there is a lode of gold or some other mineral in the mountains, they shall not be deprived of the fruits of their labor by some party who comes in after they have prosecuted their work nearly to com-

pletion, and locates the lode which was not known to exist at the time they commenced their enterprise—that is to say, if they discover by their skill, industry, and perseverance a lode they shall be entitled to the benefit of it. This bill allows miners to take 300 feet on each side of their claim. By the legislation as it now exists the amount is unlimited. * * * Where a lode is known to exist any person may locate it under the mining laws of the United States; but in a case of this kind, where parties run a tunnel and actually discover the lode, this legislation provides that they shall have a right to it" (Congressional Globe, *supra*, 534).

The bill then went to the Senate and was there amended. Section 14 was not in the original bill, but first made its appearance in the amendment. The amendment was in the nature of a substitute, but there was no material change from the original bill except the addition of section 14 (Congressional Globe, *supra*, 2456).

There is a slight difference between section 14, as approved, and section 2336, Revised Statutes.

SECTION 14. "That where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection: *Provided, however, that* the subsequent location shall have the right of way through *said* space of intersection for the purposes of the convenient working of the *said* mine: And *provided also, that* where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection."

When the bill, as amended, was returned to the House, Mr. Sargent said: "The amendment which comes from the

Senate is in the form of a substitute; yet the variations as passed by the House are very trifling" (Congressional Globe, *supra*, 2897). No other explanation was made to the House.

In the Senate the amendment was offered by Senator Stewart, of Nevada, and when the bill was reported back to the Senate by the Committee on Mines and Mining Mr. Stewart said: "There is no time this morning for any one to explain the various details of this bill, and I will not attempt to do it. It is very important that it should be passed. With the consent of the Senator who reported the bill, I wish to state that in the first instance miners legislated for themselves. Congress finally, in 1866, passed a bill embodying many of the principles of this bill, and from that time to this the Land Office has operated under it" (Congressional Globe, *supra*, 2457).

Then followed considerable discussion as to the length along the vein given under one location, but in this respect the bill permitting 1,500 feet was not changed. Neither in the House nor Senate was there any discussion whatsoever concerning any but the discovery vein, except Mr. Sargent's explanation of tunnel rights above.

An examination of the Congressional Records reveals the fact that this bill was rushed through both House and Senate, and that but little explanation was given of the real changes from the act of 1866. It must be presumed that the members of Congress were familiar with that act, since it had been the law for six years, although the members of the House disclaimed any knowledge of practical mining or the practical operation of the new bill. They depended upon the explanations given above, and in these explanations we find the real intent of the legislators. Both Mr. Sargent

and Senator Stewart, coming from the mining region, were familiar with practical mining and the application of existing laws. They were the expounders of the new bill; they announced the construction that should be placed upon it at the time of its enactment; and now to discover the intent of Congress we must turn back to the former law, for those expounders of the new bill said:

"It does not make any important changes in the mining laws as they have heretofore existed. * * * It does not increase or decrease the amount of lands or extent of leads that a miner may acquire under the mining laws."

It is then clear that Congress did not intend section 2322, Revised Statutes, to include cross or intersecting lodes save at the space of intersection of the veins; that was the former law.

Moreover, said section 2336 was an amendment, and it was drafted by Senator Stewart, whose ability to express himself in clear, concise, and unambiguous language has never been questioned. At that time he was the foremost mining lawyer of the country. Amendments have always received great consideration from this honorable court. They express the last and the best thoughts of the legislators; their controlling effect over other sections of the same statute is well recognized. This section is clear-cut and unambiguous. We insist that it should be construed, and that not one word should be changed or modified. The sole question is "what saith the statute?" If sections 2322 and 2336 are in conflict, the former must yield to the latter.

It is a canon of construction that the courts construing a statute soon after its enactment should have greater weight

than recent decisions. Hall *vs.* Equator Company was decided by Judge Hallett in 1879, and this was the first decision upon the questions involved. Even then his decisions on mining law were recognized as authority. His profound learning upon this subject is recognized throughout the mining States. His construction of section 2336 has been followed in Colorado by both State and Federal courts for the past twenty years. The decisions in other courts giving a different construction are comparatively recent.

Counsel for defendant in error have classified these later decisions under three heads, and we will discuss them in the order given in their brief.

(*a.*) THE ANTE-1872 CONSTRUCTION.

They assert that the last clause of section 2336 refers to the union of veins on the dip. This we concede. Then they say that the first two clauses refer to veins on their strike or dip, and when they refer to veins crossing on their strike the language is limited to veins located prior to the act of May 10, 1872. We concede that the language is applicable to the crossing of veins, both on their strike and dip, but there is no limitation in this section to veins located prior to May 10, 1872. The language is plain, positive, and explicit and covers all veins, intersecting or crossing, regardless of the dates of location.

And again their construction would deprive the subsequent location of the important right of way through the space of intersection of all veins crossing on the strike, located after the act of 1872, and to this extent section 2336 would be rendered a nullity.

This right of way guaranteed to the subsequent location through the space of intersection of veins crossing each other on the strike is frequently of more value than the ore contained within the space of intersection. Where a junior locator sinks his shaft upon his vein to a great depth and at large expense the right of way through the space of intersection of the veins to the valuable ore lying beyond may be of vast importance. It may save him the expense of sinking a new shaft on the opposite side of the intersection, whereas to drift from the bottom of the old shaft through the space of intersection would be of but little expense in comparison with the sinking of a new shaft. Section 2336 was intended to cover this condition.

(*b.*) THE UNION ON THE DIP CONSTRUCTION.

Here counsel claims that section 2336 is confined to a crossing or union of veins on their dip; that it does not apply to the crossing of veins on the strike. This is their pet theory, and in oral argument they practically repudiated the other constructions suggested in their brief.

What we have said in the foregoing discussion applies equally here. In their brief, page 27, counsel say:

"True it does not expressly speak of the crossing or union of veins *on their dip*. But it is dealing with a condition *created by the act itself*."

We think that section 2336 is dealing with a condition created by nature. It deals with known physical facts and makes no attempt to change nature's laws. Nature has caused veins in "countless thousands" to cross each other

on their strike. This crossing on the strike is conceded in the statement of facts upon which the case was tried; but in what mine or in what country have two veins crossing solely on their dip been exposed? This question was propounded in the lower courts, but no answer comes. Such a condition would be a geological phenomenon. Laws are enacted to cover known facts, not theories. When veins come together on their downward course they unite and become one vein. The last clause of the section provides for this condition; the first two clauses provide for veins crossing either on their strike on dip.

On page 28 of their brief opposing counsel say "the punctuation is a little unfortunate; but the use of the co-ordinate conjunction 'and' at the beginning of the last clause establishes a close connection between it and the two preceding clauses." But this fond hope must fade when it is observed that the last clause in the section as approved was originally a *proviso*.

Counsel then urge that this section was intended to preserve existing rights, but they are protected by section 16 of the original act.

SECTION 16. "That all acts or parts of acts inconsistent herewith are hereby repealed: *Provided*, That nothing contained in this act shall be construed to impair in any way, rights or interests in mining property acquired under existing laws."

(*c.*) INTERSECTION OF LOCATIONS CONSTRUCTION.

It will be observed that in either of the foregoing constructions something must be injected into or taken away from the statute. No court nor text-writer has ever

been able to follow either of these constructions without first making some change or modification of section 2336. After making such changes they find it ambiguous; then they construe away a portion of its meaning. Courts should simply construe the section. Congress alone has the right to repeal it.

The last construction offered by counsel has never been followed by any court, except, possibly, the supreme court of Montana and the supreme court of Colorado in this case.

Counsel claim that the former Colorado rule is in conflict with certain Federal court decisions, and they cite Del Monte *vs.* Last Chance Company, 171 U. S., 55.

In that case there was but one vein and it was the discovery vein; the question of cross-veins was not before the court. In the case at bar the Victor Consolidated is conceded to be a cross-vein, and that it was not known to exist till we discovered it in the Victor Consolidated discovery shaft; this vein crosses the side lines of the Monarch and Mammoth Pearl claims, and it crosses one side line and one end line of the Apex claim; it crosses each of the veins of t' e claims on their strike. The language of the case cited above is *obiter dictum.*

The supreme court of Colorado said, *inter alia*, as to the meaning of the term, space of intersection:

"Our conclusion is that the provisions of section 2336 apply to locations made under the act of 1872 as well as before; refer to the intersection and crossing of veins either upon their strike or dip; that the space of intersection, in determining the ownership of ore within such space, means either intersection of veins or conflicting claims according to the facts in each particular case, grants a right of way to the junior claimant for the convenient working of his mine

through such space upon the veins (and underneath the surface) which he owns or controls outside of that space."

The term in question should have a fixed and definite meaning; the same term should not be held to have different meanings in the same section or in the same act. If we grant, for the purposes of the argument, that space of intersection as it is found in the first sentence of the section in question may mean space of intersection of claims, the term cannot reasonably be held to have that meaning as it occurs in the last sentence. This sentence refers to veins uniting on the dip. It refers to veins in their descent into the earth. It provides for ownership below "the point of union, including all the space of intersection." If space of intersection, as used in this sentence, be held to mean space of intersection of claims, then the section would extend the terms of grant to the owners of senior surface claims beyond the words of section 2322, and would deprive the owner of junior claims of that which is specifically granted under that section. Under section 2322 the owners of surface claims are entitled to "the exclusive right of possession and enjoyment of all the *surface* included within the lines of their locations, and of all *veins, lodes, and ledges* throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations." Under this section the owner of a junior claim is granted specifically the right to follow his vein upon the dip into a senior surface location. The Government in making a

grant to the owner of a surface location makes a grant subject to the right aforesaid.

If the term space of intersection, in the last sentence of section 2336, be held to mean space of intersection of claims, then the owner of a surface claim would be entitled to all that portion of a vein having its apex outside of the side lines of such surface location included within the planes of the side lines. The right of the owner of the apex of a vein would thus be limited by the plane of the side line of his claim out of which his vein extended. As this would be an absurd conclusion and would nullify entirely the intent of section 2322, so far as following veins upon their dip is concerned, this interpretation cannot be adopted. Therefore this term in this sentence must be construed to have a fixed meaning, and that is, space of intersection of veins. If, then, in the first sentence of this section the term may mean space of intersection of claims, or of veins, according to the varying circumstances of cases, then the same term in the same section of the same act has entirely different meanings.

If this term "means either intersection of vein or conflicting claims according to the facts of each particular case," then the court before which the case is brought, involving this section, ceases to be the construer or interpreter of the section, and the jury performs such function.

When it is said that to give any part of the space of intersection of claims to the holder of a later location would be to take from the older location something already granted to it the entire question is begged, for the reason that it is assumed in such a statement that the older location has been granted all of the cross-veins within the

limits of the prior location. The patent cannot limit the statute nor can it extend the terms of it. The extent of the grant must be determined by the words of the statute. The meaning of the statute must be determined by rules of interpretation and of construction which are well settled.

There is no disputing that after the passage of the act of 1866, and prior to the act of 1872, the owner of a junior location could follow his vein upon its strike within the side lines of a senior location up to the very point of intersection of the junior with the senior vein. At the time of the passage of the act of 1872 space of intersection had a definite meaning. It meant space of intersection of veins, and of veins alone. A patent granted under the act of 1866, however broad its terms, granted only the right to a specific vein and to one vein. Under the act of 1872 other veins than the location vein were granted, but there is no presumption that there are any other veins within a claim than the location vein. It is intended under the act of 1872 that location shall be made along the strike of a vein and not across its course. If there is any presumption as to the direction of a vein or of veins within a claim, that presumption is that the direction of such vein or veins is in the direction of the surface location. It is stated in the opinion of the supreme court of Colorado that if space of intersection means of veins and not of claims, then there would be no right to a junior locator of a cross-vein to follow such vein within the senior to the point of intersection of the vein. This begs the entire question for the reason that it assumes that a patent issued under section 2322 grants all cross-lodes as well as those having their general course in the direction of the location of the

senior claim. If space of intersection used in section 2336 at the time of the adoption of this section and of the passage of the act containing it had a definite and known meaning, that same meaning must be adhered to now.

The decisions heretofore cited in the brief filed in this court by the plaintiff in error show that such expression did have a definite meaning at that time, and that it is only in these latter years that a new interpretation has been given to it.

Surface rights are merely incidental to rights granted on account of the location of a vein. If there be no vein there can properly be no mining claim. Section 2320 provides, *inter alia*, "No location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located." Section 2322 grants the exclusive right of possession "of all the surface," etc. Below the surface nothing is granted according to the specific terms of section 2322 than veins, lodes, and ledges having their apexes within the surface lines of the claim. Below the surface nothing is referred to but veins, lodes, or ledges, but the right of way referred to under section 2336 is a right of way "*through* the space of intersection for the purposes of convenient working of the mine." There is no right of way granted *over* any space of intersection. Underground working is what is referred to.

If the term, space of intersection, be interpreted to mean space of intersection of claims, then either the right of exclusive possession of the surface to which a senior locator is entitled would be interfered with, and section 2322 limited in that respect, or the right of way would extend *to* the sur-

face; and the portion of the first sentence of section 2336 after the semicolon would read in effect:

"but the subsequent location shall have the right of way through all of the territory in conflict, except the surface, for the purposes of convenient working of the mine."

The subject of section 2336 is veins. The first clause refers to veins and specifies veins. In that clause the words "intersect or cross" are indissolubly connected with the word "veins." The words immediately following, "*priority of title shall govern*," refer to veins. Thus far the word location has not been used. When in the following clause the words "such prior location" are used they attach themselves to the preceding words, and can mean nothing else than prior location of veins. Veins, lodes, or ledges are the subjects of location. If this be true, then the first use attaches itself to veins and not to the word *location* changed into the word "claim." The word "claim" does occur in the following portion of the first sentence. The words "subsequent location" continue to refer back to a preceding portion of the section, and if those words attach themselves to the word *veins*, then the term *space of intersection* following refers to space of intersection of veins. It has been heretofore shown that in the last sentence the term must mean space of intersection of veins, and therefore the expression has the same meaning throughout all portions of the section.

If this construction of the act be adopted there is no necessity to deal with the subject of reservations or of exceptions. It is useless to consider whether any right is reserved or any right is excepted from the grant. The statute itself determines the extent of the grant.

Under the act of 1866 the owner of the junior claim could work his vein within the senior claim up to the intersection of the two veins, but no right of way through the senior vein was granted by the act, nor was any provision made in it as to the ownership of the ore within the space of the intersection of the veins. This was the evil intended to be remedied by section 2336.

According to all canons of construction the decision of Judge Hallett in Hall *vs.* Equator Mining Co., Fed. Cases No. 5931, in 1879, was correct, and the supreme court of Colorado in the case now under discussion committed an error.

THE SECOND, THIRD, AND FOURTH ASSIGNMENTS OF ERROR.

In interpreting the statutes of the United States in relation to the rights of tunnels, such interpretation should be made as to carry into effect the object of those statutes.

In the Enterprise Mining Co. *vs.* Rico-Aspen Mining Co., 66 Fed., 200, the circuit court of appeals of the eighth circuit said:

"It has been the settled policy of the United States from the passage of the first act of Congress opening the mineral lands of the nation to exploration and occupation of July 26th, 1866, to the present time, to encourage the discovery and development of the mineral resources of the country."

These mineral resources, so far as the gold and silver are concerned, occur in the form of veins breaking through the surface of the earth's crust in the form of irregular deposits or in the form of placers. From this outcrop at the earth's surface others may be easily discovered by sinking a few

feet in the wash; others are hidden hundreds of feet below the surface with no indication on the surface that they exist. "The settled policy" includes the development of the last as well as of the first. To encourage prospecting for and discovering what are called "blind lodes" section 2323 was inserted in the act of Congress. No interpretation should be made of the act which will minimize this section.

This honorable court, in Enterprise Mining Co. *vs.* Rico Mining Co., 167 U. S., 108, said:

"It may be true, as counsel claim, that this construction gives the tunnel and excavation some advantages. Surely it is not strange that Congress deemed it wise to offer some inducement for running a tunnel into the side of the mountain. At the same time it places specific limitations on the rights which the tunnel-owner could acquire. He could acquire no veins which had theretofore been discovered from the surface; his right reached only to blind veins, as they may be called—veins not discovered from the surface before he commenced his tunnel."

In this quotation this court has suggested the interpretation which will carry out a "settled policy" to encourage the discovery and development of the mineral resources of the country. Such interpretation would result as follows: The owner of a surface claim properly located before the location of a tunnel site would be entitled, as against a tunnel-owner, to his discovery vein, the specific vein on account of which a grant was made, and to all other veins having their apexes within the surface boundaries of his claim and discovered from the surface before the tunnel was located. The tunnel-owner would be entitled to all veins which were not discovered from the surface before

he commenced his tunnel. If it be finally held that simply by sinking a discovery shaft upon a vein, staking upon the surface the boundaries of the claim, recording the location certificate, segregates from the public domain all veins and all territory within the boundaries of the claim; that said alleged rights may be maintained by the performance upon the claim until application for patent of the insignificant amount of labor required, and that a tunnel-owner can neither drive his tunnel through the claim nor be entitled to blind veins—veins not known to exist at the time the tunnel was located—section 2323 will be in effect a nullity. In no mining district could a tunnel of any prospective value be located except in one in which the tunnel locator happened to be the first upon the ground. A tunnel cannot wind and twist its way around and through a mining district in order to avoid prior located claims. It must be run in a straight line. Its course must be marked upon the ground, and that course must be approximately followed. Each claim in a district is entitled under the act, if there be no conflicting claim, to fifteen hundred feet along the course of a vein, which would require but few claims to extend across the entire district.

It is known that within a short time after the discovery of value within a district the entire territory offering hope of reward is covered with locations. There are few places within a district at which a tunnel site can be so located as that a tunnel may be properly run therefrom. It is thus seen that section 2323 must in effect be a nullity unless it be so interpreted as to enable a tunnel-owner to run through a claim located prior to the date of the location of the tunnel.

If the law be interpreted as we contend that it should, then an incentive is given to the owner of a surface location to prospect that location diligently, for the purpose of discovering the veins therein, for the reason that any vein which would be discovered prior to the location of any tunnel across his location would be his; and an incentive would be given to prospective tunnel locators to develop the hidden mineral resources which may not easily be discovered from the surface.

If it be said that if such a construction be adopted, then the grant under section 2322 is limited, the answer is that any grant made under any one section of the act and any grant made under the act is subject to all the provisions of the act. A grant under section 2322 would be made subject to all following sections. If there be a conflict between the different sections of the same act, and it is impossible to reconcile all of the provisions of the act by any construction, then those sections which follow must govern rather than those which precede; and if there be a conflict between an amendment to an act and any portion of the act which was in force prior to the amendment, the amendment must govern. If it be held that section 2322 refers primarily to surface locations to veins, lodes, or ledges discovered from the surface, and that section 2323 refers primarily to veins, lodes, or ledges not previously known to exist and not appearing on the surface, an interpretation will be adopted which will harmonize both sections. The terms of the grant then, under section 2322, would in effect be as follows: That the owner of the surface location located prior to the location of a tunnel would be entitled to the exclusive possession of the surface ground within the lines of his loca-

tion and of the veins, lodes, and ledges throughout their depth, the top or apex of which lies inside of such surface lines extended downward vertically, discovered and disclosed within the boundaries of the claim prior to the location of a tunnel across the claim.

This honorable court in Enterprise Mining Company *vs.* Rico-Aspen Mining Company, 171 U. S., 108, cites with approval the language of the circuit court of appeals, to wit: "Veins or lodes discovered on the surface or exposed by shafts from the surface must be *found* before any right to them vests." This language is in harmony with Mr. Sargent's explanation quoted above, to wit: "Where parties run a tunnel and *actually discover the lode*, this legislation provides that they shall have a right to it." In the statement of facts it is conceded that we *found* all the lodes in controversy, and that they do not appear on the surface and were not known to exist previous to the location of our tunnel.

In Del Monte Mining Company *vs.* Last Chance Mining Company, 171 U. S. Rep., 66, this honorable court said that "It needs no argument to show that if this were the only section (2319) bearing upon the question, patents for land containing mineral would, except in cases affected by local customs and rules of miners, be subject to the ordinary rules of the common law, and would convey title to only such minerals as were found beneath the surface. We therefore turn to the following sections to see what extralateral rights are given and upon what conditions they may be exercised. And it must be borne in mind in considering the question presented that we are dealing simply with statutory rights."

In this case the court held that section 2319 was modified and controlled by section 2322.

During our oral argument before this honorable court Mr. Justice White propounded the following question, to wit: Does not your construction of the tunnel section deprive the prior surface location of property rights? And we gave a negative answer and said that under the rule of construction announced in the case of Del Monte Mining Company *vs.* Last Chance Mining Company we should turn to the following sections to see what tunnel rights were given and upon what conditions they might be exercised: that section 2319 was modified and controlled by section 2322, and that each of these sections was modified and controlled by section 2323; that common-law principles were not applicable; that the patent to the surface location did not include the blind veins within the exterior boundaries of the claim, which were not known to exist at the date of the location of the tunnel; that title to such veins remained in the Government until the tunnel was located; that since the right to such veins never passed to the older location, it was not deprived of any property rights; that all the sections of the mining act must be construed together and not separately.

Under the fourth assignment of error the opposing counsel cite many authorities to show that we cannot attack their patents in a collateral proceeding. We concede the correctness of this proposition. We do not attack their patents, as shown in our former brief. We simply desire to show that the patents of the Monarch and Mammoth Pearl claims do not relate back to a time previous to the location of our tunnel. We claim the right to show this under Enterprise Min-

22531

ing Co. *vs.* Rico-Aspen Mining Company, *supra*. The cases cited in our former brief support our contention.

We respectfully submit that the supreme court of Colorado in the case now under discussion committed error and should be reversed.

Respectfully submitted.

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Attorney for Plaintiff in Error.